Supreme Court, U. S.
FILED
OCT 30 1980
MICHAEL RODAK, JR., CLERK

No. 80-395

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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LESLIE MINYE,

Petitioner,

v.

UNIVERSITY OF MICHIGAN, REGENTS OF THE UNIVERSITY OF MICHIGAN, EXECUTIVE COMMITTEE OF THE SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN, AND SCHOOL OF DENTISTRY OF THE UNIVERSITY OF MICHIGAN,

Respondents.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In this civil rights action which claims that the University of Michigan discriminated against plaintiff in dismissing him from Dental School after he failed, repeated and failed for a second time two essential clinical courses, did the Court of Appeals for the Sixth Circuit properly affirm the District Court's granting of summary judgment in favor of defendants, entered after finding on the basis of exhaustive discovery that:

(a) Plaintiff presented no evidence that defendants were arbitrary and capricious in their dismissal of the plaintiff from Dental School, nor did plaintiff present any evidence in support of his Complaint.

(b) Defendants presented documents clearly showing that plaintiff was not denied due process under the 14th Amendment and that the defendants did not dismiss plaintiff in an arbitrary or capricious manner.

(c) The procedure followed by the University of Michigan for dismissal of plaintiff in this case satisfied the requirements of *Board of Curators* v. *Horowitz*, 435 US 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978).

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## BRIEF FOR RESPONDENTS

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## COUNTER-STATEMENT OF THE CASE

### I. NATURE OF THE CASE

Plaintiff's single-count Complaint is essentially based up-

on 42 USC 1983 and 1985. (7a) * The case arises out of plaintiff's matriculation at and dismissal from the University of Michigan Dental School. Unlike students of other schools, Dental School and Medical School students must take certain courses and must pass all courses taken. (248a-249a) The plaintiff in this case was in academic trouble during most of his three years at the University of Michigan Dental School and frequently was on probation. (55a-56a) In his first year he failed Oral Pathology twice, was placed on probation and finally dropped for poor scholarship following a hearing before the Executive Committee. (*Ibid.*) Upon readmission on probation he failed Operative Dentistry and Periodontics and again was dismissed following a hearing. (*Ibid.*) Upon readmission upon strict probation he repeated the two courses which he failed previously and failed both of them a second time. (*Ibid.*) He was again dismissed from the Dental School and thereafter brought this action. (*Ibid.*)

## II. THE PROCEEDINGS BELOW

On October 6, 1977, plaintiff filed his Complaint against the University of Michigan, its President and officials and faculty of the School of Dentistry. (7a) The heart of plaintiff's Complaint was contained in a single paragraph (9a), which read as follows:

> 15. That upon entry into his senior year, Plaintiff was accused of and discriminated against because:
>
> A. He was accused of being unable to perform certain tasks which were accomplished satisfactorily in his lower classes;

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* Refrences are to the Joint Appendix on appeal to the Sixth Circuit. Petitioner has not yet requested that the record in that Court be certified and transmitted.

B. Accused and charged with incompetence on a subjective basis;

C. Being dirty i.e. in need of a bath;

D. Having long hair which was improper for a dentist;

E. Having facial hair which was improper for a dentist;

F. Being foreign born;

G. Speaking with a foreign accent;

H. Accusing Plaintiff of having an aggressive personality with a documented psychiatric problem;

I. Having the wrong attitude in dentistry;

J. In being too interested in passing his course;

K. In not working on patients;

L. Falsely accused of performing certain work in an improper manner;

M. Accused by certain members of the faculty as being "unteachable".

Defendants promptly answered plaintiff's Complaint and set forth the following matter in paragraph 15 of their Answer (27a-28a) :

15. The allegations contained in paragraph 15 are denied as untrue in the manner and form alleged, except that a dental student's personal habits and appearance are proper subjects for regulation because patients are treated in clinical courses. Such regulations were at all times published in the Clinic Procedure Manual, a copy of which

> was given to each student, including plaintiff. Pertinent to paragraph 15 of plaintiff's Complaint, a copy of Parts I, II and III of the current Manual is annexed hereto as Exhibit A (7 pages). Further answering, defendants aver that plaintiff was dismissed from the School of Dentistry for poor scholarship as a result of plaintiff's receiving failing grades in Senior Operative Dentistry and Periodontics. A copy of a letter explaining to other dental schools why plaintiff was dismissed from the University of Michigan Dental School is annexed hereto as Exhibit B (1 page).

Thereafter, extensive discovery was undertaken and completed by both sides. The plaintiff himself was deposed for a full day. Following plaintiff's deposition, and over a period of three full days, the plaintiff's attorney deposed nearly every administrator or faculty member of the University of Michigan School of Dentistry who had any contact with or knowledge concerning the plaintiff. In all, 15 depositions were taken.

These depositions were not limited in scope, totaled nearly 1,000 pages of testimony and were supported by numerous exhibits. In addition, plaintiff requested and received hundreds of documents (including those at 535a-575a, the documents relied on in defendants' Supplemental Brief to the District Court) constituting substantially the complete files pertaining to plaintiff's enrollment, probation and dismissal from the University of Michigan School of Dentistry.

Upon completion of discovery, defendants moved for summary judgment (434a) and the District Court held a hearing on December 22, 1978. (480a-523a) After entertaining oral argument, the court took defendants' Motion

under advisement but requested supplemental briefs from both sides on the issue whether plaintiff was accorded due process in being dismissed from the Dental School. (521a)

In an undated supplemental brief[1] filed sometime in January of 1979, plaintiff quoted from deposition testimony and attached Minutes of the Executive Committee meetings of the School of Dentistry to show that plaintiff was dismissed from the Dental School after the members of the Executive Committee were polled by telephone to see whether they would affirm or reaffirm their previous action to dismiss the plaintiff. Plaintiff then stated that "plaintiff feels * * * that there is a clear showing of arbitrary and capricious conduct by the Dental School and by the instructors in the Dental School as it relates to plaintiff." However, plaintiff went on to assert that "[p]laintiff can, and will, indicate to the court, should the court desire, by making reference to the depositions which were taken of these various individuals of the arbitrary action. If and when the court requests this it shall be done forthwith." Notwithstanding that the court had specifically requested supplemental briefs on the due process issue, plaintiff did not make any argument supporting his assertion that the above-mentioned telephone poll violated the due process clause.

Defendants filed with the district court on February 6, 1979, 30 exhibits concerning plaintiff's matriculation at the University of Michigan School of Dentistry. (535a-575a) These exhibits were presented to the district court with the following identification and analysis (*Ibid.*):

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[1] Plaintiff's brief was not included in the Joint Appendix but was part of the record on appeal to the Sixth Circuit.

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 08/30/72 | Admitted to Dental School | Mr. Minye was admitted even though his Dental Admission test scores were very low in the two manual areas of spatial relations and carving dexterity, which would serve as an indicator of future difficulty in clinical work. See *Defendants' Answers to Plaintiff's First Interrogatories* (Interrogatory No. 5) dated February 17, 1978. |
| 05/11/73 | Notification of deficiency in Preclinical Dentistry Exhibit 2 [537a] | Personally received by Mr. Minye on May 11, 1973. |
| 05/30/73 | Failure of Oral Pathology — *placed on probation* Exhibit 3 [538a] | Mr. Minye was advised of the procedure necessary to continue in the Dental School. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 08/06/73 | Conference with Mr. Minye Exhibit 4 [539a] | Personal conference where re-examination procedure was explained to Mr. Minye. |
| 08/13/73 | Failure of Oral Pathology for the second time Exhibits 1, 4, 5 [535a, 539a-540a] | Also failed to keep appointment to discuss test result. |
| 08/27/73 | Conference with Mr. Minye Exhibit 4 [539a] | Procedure explained to him and referred to Dean Doerr. |
| 08/31/73 | *Hearing before Executive Committee* Exhibit 6 [541a] | Mr. Minye appeared before the Executive Committee. The Committee talked with him and recommended that he withdraw from School. |
| 08/31/73 | *Dropped from Dental School for poor scholarship* Exhibit 1 [535a] | Following hearing before Executive Committee. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 09/73 | Conference with Mr. Minye [Exhibit 7 [542a] | Associate Dean Doerr advised Mr. Minye of his rights. |
| 09/17/73 | Letter to Mr. Minye Exhibit 7 [542a] | Confirmation of conversation with Associate Dean Doerr who advised Mr. Minye of procedure for readmission. |
| 01/74 | Re-enrolled in Dental School Exhibits 1, 7 [535a, 542a] | Status as second term, first year student. |
| 08/27/75 | Deficient work in clinical courses Exhibit 1 [535a] | Inadequate grades received in Community Dentistry, Endodontics and Operative Dentistry, later changed to passing grades. |
| 01/09/76 | *Placed on probation* Exhibit 8 [543a] | Executive Committee acted on basis of scholastic records. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 01/14/76 | Conference with Mr. Minye<br>Exhibit 9<br>[545a] | Mr. Minye advised in writing of his probationary status and advised of procedure to continue in the Dental School. |
| 08/26/76 | Executive Committee meeting<br>Exhibit 10<br>[546a] | Committee decided to request Mr. Minye to meet with them as soon as possible. |
| 08/31/76 | Letter to Mr. Minye<br>Exhibit 11<br>[547a] | Mr. Minye invited to meet with Committee on 9/10/76. |
| 09/10/76 | *Hearing before Executive Committee*<br>Exhibit 1, 12<br>[535a, 548a] | Having been advised by letter (Exhibit 11) that he had the right to first meet with the Dean personally, Mr. Minye met with the full Executive Committee and had a hearing concerning his probationary status. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 09/15/76 | Letter to Mr. Minye<br>Exhibit 13<br>[549a] | Mr. Minye advised that he was on strict academic probation and the consequences of that status were explained to him in writing. He was advised to make an appointment to see the Associate Dean "at the earliest time that is mutually convenient." Further advised that the University was "anxious to assist in an improvement of your academic progress." |
| 09/20/76 | Request of Dental School Dean<br>Exhibit 14<br>[550a] | Dean Mann's request of faculty that fourth-year students in academic difficulty receive counseling. |
| 10/06/76 | Report of Operative Dentistry Department<br>Exhibit 14<br>[550a] | Dental School Administration advised that Mr. Minye would receive counseling. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 10/19/76 | Conference with Mr. Minye Exhibit 15 [551a] | Dr. Kahler of Operative Dentistry Department met with Mr. Minye and "discussed rather thoroughly" the reasons for his failure of the Senior Clinic in Operative Dentistry and noted that "past discussions" had been had. |
| 11/15/76 | Report from Periodontics Department Exhibit 16 [552a] | Associate Dean Doerr advised by Periodontics Department that Mr. Minye produced the poorest quality work of all of the students having difficulty in Periodontics. |
| 11/16/76 | Report from Operative Dentistry Department Exhibit 17 [553a] | Associate Dean Doerr advised by Operative Dentistry Department that Mr. Minye's work was so poor that he should be removed completely from patient contact in order to protect patients. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 01/07/77 | *Dismissal from Dental School* Exhibit 18 [554a] | Executive Committee routinely considered scholastic records of all students and dismissed Mr. Minye (and others) from the Dental School. |
| 01/13/77 | Conference with Minye [52a-53a] | Dean Doerr met with Mr. Minye and offered him an opportunity to meet with Executive Committee on January 21, 1977, to appeal his dismissal from Dental School. See *Defendants' Answers to Plaintiff's First Interrogatories* (Interrogatory No. 9) dated February 17, 1978. |
| 01/17/77 | Letter from Mr. Minye Exhibit 19 [556a] | Acknowledgement by Mr. Minye of emotional and academic problems and request for readmission to the Dental School. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 01/17/77 | Conference with Mr. Minye [53a] | Dean Doerr met with Mr. Minye again. See *Defendants' Answers to Plaintiff's First Interrogatories* (Interrogatory No. 9), dated February 17, 1978. |
| 01/21/77 | *Hearing before Executive Committee* Exhibit 20 [559a] | Mr. Minye was given a hearing before the Executive Committee to appeal his dismissal and "after a lengthy discussion the Committee reaffirmed its position for dismissal." |
| 01/25/77 | Letter to Mr. Minye Exhibit 21 [560a] | Written advice to Mr. Minye that the Executive Committee reaffirmed its previous decision to dismiss him from school. Mr. Minye was advised that he could talk further with the Associate Dean "at any time you desire." |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 02/11/77 | Executive Committee meeting Exhibit 22 [561a] | Executive Committee noted that Mr. Minye "apparently was preparing another appeal." |
| 02/22/77 | Letter from Mr. Minye Exhibit 23 [562a] | Petition for readmission and request for personal appearance before the Executive Committee on a rehearing. *This document clearly shows that Mr. Minye knew of his rights.* As appears from Associate Dean Doerr's sworn answer to Interrogatory No. 9, Mr. Minye personally delivered this letter to Dean Doerr and numerous personal conferences were had with Mr. Minye whereat the procedure was explained to him. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978. See also *Doerr Deposition,* pp. 15-17, 23-24 and 35-42. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 02/25/77 | Meeting of Executive Committee Exhibit 24 [568a] | Associate Dean of the Dental School advised Executive Committee that the Dental School administration had received a telephone call from Dr. William Cash, Assistant to the President of the University of Michigan, concerning the dismissal of Mr. Minye. No action was taken by the Executive Committee. |
| 02/25/77 | Conference with Mr. Minye [53a] | Dean Doerr again met with Mr. Minye and explained position of Executive Committee and advised Mr. Minye that no new evidence was presented to justify reconsideration. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 03/21/77 | Conference with Mr. Minye [53a] | Dean Doerr met again with Mr. Minye. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978. |
| 04/08/77 | Meeting of Executive Committee Exhibit 25 [569a] | *Committee voted to readmit Mr. Minye on strict probation under a specific program of study.* |
| 04/12/77 | Conference with Mr. Minye [53a] | *Dean Doerr met with Mr. Minye and explained action of Executive Committee in readmitting him on strict probation. Mr. Minye was advised that another failing grade would result in dismissal from school with no further recourse. Mr. Minye acknowledged that he understood this condition.* See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 05/02/77 | *Readmitted on strict probation* Exhibit 1 [535a] | Readmitted under strict probation and notation made on official transcript. See *Defendants' Answers to Plaintiff's First Interrogatories* dated February 17, 1978. |
| 07/19/77 | Meeting of Executive Committee Exhibit 26 [570a] | Letter of Mr. Minye was read to Executive Committee. |
| 08/04/77 | Letter to Mr. Minye Exhibit 27 [571a] | Letter from President of the University to Mr. Minye advising him that he could complain to the Dean's office or to the Office of Student Services in the Michigan Union. (Copy of Mr. Minye's letter is attached to the original transcript of his deposition as Exhibit No. 2). |
| 08/18/77 | Meeting of Executive Committee Exhibit 28 [572a] | Committee again reviewed the academic records of Mr. Minye. |

| Date | Event and Exhibit | Commentary |
|---|---|---|
| 08/23/77 | Vote of Executive Committee Exhibit 29 [574a] | Committee was polled by telephone on August 23 and 24 concerning the academic record of Mr. Minye and voted unanimously to confirm its earlier decision to dismiss him from the school because of his scholastic record. |
| 08/23/77 | Letter to Mr. Minye Exhibit 30 [575a] | Mr. Minye advised in writing that the Executive Committee decided to dismiss him from the Dental School based upon his failure for the second time of two clinical courses (Operative Dentistry and Periodontics) which he repeated in a special Summer program. Mr. Minye was advised that he could speak with the Dean if he thought he could be of assistance in any way. |

As noted above, the documents and brief submitted by defendants were requested by the District Court (521a). In response, plaintiff filed a three-page Reply to Defendants' Brief Re Due Process Issue where plaintiff merely asserted that "certain statements and 'commentary' included in defendants' pleading" were disputed by plaintiff, but plaintiff failed to state in what way they were disputed and plaintiff failed to challenge or contest a single document submitted to the District Court. Plaintiff did state that he would not "alter his opinion that [discrimination] has occurred."

On April 4, 1979, District Judge James P. Churchill handed down a Memorandum Opinion (576a) granting defendants' Motion for Summary Judgment. An Order (577a) and Judgment were entered pursuant to the Opinion on April 5, 1979. (578a)

Plaintiff appealed (579a) to the Court of Appeals for the Sixth Circuit, which affirmed the Judgment of the Eastern District of Michigan, Southern Division. Plaintiff now petitions this Court for a Writ of Certiorari.

## ARGUMENT

### I. PLAINTIFF COMPLETED HIS DISCOVERY BUT WAS UNABLE TO PRESENT ANY EVIDENCE TO SUPPORT THE ALLEGATIONS CONTAINED IN HIS COMPLAINT.

It cannot be too strongly emphasized that plaintiff was accommodated every way possible in the exercise of discovery. Every shred of paper relating to plaintiff was produced by the defendants and the entire faculty of the Dental School was made available for deposition. Plaintiff's attorney deposed 14 of plaintiff's professors and the depositions themselves lasted for three full days.

Plaintiff had over seven months after the conclusion of those depositions, and before the District Court ruled, to conduct additional discovery or to submit documents supporting the contentions made in his Complaint. He was unable to do so, and paragraph 15 of the Complaint was without evidentiary support. The most that plaintiff has been able to produce is the assertion in plaintiff's Supplemental Brief filed in January of 1979 that "plaintiff feels * * * that there is a clear showing of arbitrary and capricious action" by the defendants.

On appeal, plaintiff listed 50 "issues of fact" which he claimed should have prevented summary judgment. (Petition for Writ of Certiorari, at 23.) None of these were argued to the District Court, and even if they had been they would not have raised genuine issues of fact.

The law requires more than a feeling, it requires evidence. *Appolonio* v. *Baxter,* 217 F.2d 267 (6th Cir. 1954). The plaintiff would contend that he is allowed to have a trial to support the "mere hope" that evidence will turn up to support some of his claims. *Id.* at 271.

In *First National Bank* v. *City's Service Co.*, 391 US 253, 20 L.Ed. 2d 569 (1968), this Court affirmed the Second Circuit's decision affirming a district court's grant of summary judgment for the defendants. There it was noted:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring anyone who files [a] * * * complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. [391 US 253, at 290.]

The Second Circuit had recited plaintiff's extensive depositions in that case and had observed:

> Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. [361 F2d 671, at 673 (2d Cir. 1966.)]

Petitioner argued on appeal and in his Petition here (Petition, at pp. 10-13) that because Judge Churchill's Memorandum Opinion did not specifically refer to each claim in plaintiff's Complaint, said Opinion should operate only as a partial summary judgment under F.R.Civ.P. 56(d). Petitioner, however, overlooks F.R.Civ.P. 52, which exempts decisions on motions brought under Rules 12 and 56 (as this motion was) from the general requirement that the Court file findings of fact and conclusions of law supporting its decisions. The Court's silence simply means that dismissal on the pleadings and/or summary judgment was granted as to plaintiff's entire claim, as moved by defendants.

Nor was the trial court's insistence (513a, 521a) that the parties guide him by means of supplemental briefs to the facts they considered important in any way an abuse of discretion. The fact that plaintiff chose to gamble that defendants would not carry their burden of showing no material issues of fact does not now give him cause to complain that the trial court found defendants' summary of the facts useful:

> Clearly the opposing party is subject to considerable risk, and justifiably so, in the * * * situation where he has made no attempt to avail himself of [further discovery pursuant to] Rule 56 (f) and on the papers before the court the moving party is entitled to summary judgment. Certainly the opposing party cannot hold back his evidence until trial. [6 Moore's Federal Practice ¶ 56.15 (6), at p. 56-605.]

As observed in *Interstate Circuit, Inc.* v. *United States,* 306 US 208, 226 (1939):

> The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. * * * Silence then becomes evidence of the most convincing character.

## II. DEFENDANTS PRESENTED AMPLE EVIDENCE THAT THEY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN DISMISSING PLAINTIFF FROM THE UNIVERSITY OF MICHIGAN DENTAL SCHOOL.

Dean Doerr testified that a dentistry student was required to pass all of his clinical courses in order to graduate with the DDS degree. (248a-249a) Like medical school graduates, dental school graduates are certified by their graduating institutions as being ready to treat patients. Therefore, if they are to receive licenses to do so, they must pass all clinical courses. This is because patients are treated in the clinical courses and if the student cannot successfully treat a patient in a course, he or she cannot successfully treat a patient in the outside world. (Testimony of Dean Doerr, 248a-250a)

It is uncontradicted that the plaintiff was on probation in his third year when he failed both Periodontics and Operative Dentistry, that he was dismissed and readmitted on strict probation and that he repeated both of those courses and failed them a second time. He was then dismissed once and for all and brought this lawsuit. As already noted above, he was unable to produce any documents to show that his repeated failure of these courses was based upon anything other than his own lack of ability. None of the conclusions contained in paragraph 15 of his Complaint were supported in the ensuing discovery. Rather, defendants produced a profusion of documents (535a-575a) to support their Answer to the plaintiff's Complaint and to affirmatively show that he was not dismissed in an arbitrary and capricious manner.

Those documents were made available to plaintiff on discovery and thirty of them were presented to the District

Court as exhibits when that court requested documentation on the due process issue. All of those documents are relevant, non-hearsay and admissible. Plaintiff's attorney had them while taking the depositions of the fourteen faculty members and administrators, yet plaintiff's attorney chose not to interrogate those witnesses on most of those documents. As noted by Professor Moore, a court may consider "other papers that have been identified by affidavit *or otherwise made admissible in evidence.*" 6 Moore's Federal Practice, ¶ 56.11 at p. 56-204. (Emphasis supplied.) *The admissibility of these thirty exhibits was never questioned* by plaintiff's counsel in the District Court. Both sides understood that they would be admissible at trial and usable on motion. Indeed, plaintiff's first attorney — who drafted the pleadings, conducted all discovery and briefed and argued the summary judgment motion — did the same thing himself and attached some of those documents to his own supplemental brief on the due process issue.[2] We respectfully submit that what plaintiff's fourth attorney now objects to was agreed upon by plaintiff's first attorney. In any event, the objection was neither timely made nor preserved for appeal.

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[2] Indeed, plaintiff *relies* on some of such documents in his petition filed in this Court. See, *e.g.*, plaintiff's Petition, at pp. 17-18.

## III. THE ADMINISTRATIVE PROCEEDINGS FOLLOWED BY THE UNIVERSITY MET ALL APPLICABLE DUE PROCESS REQUIREMENTS ESTABLISHED BY THE SUPREME COURT'S DECISION IN BOARD OF CURATORS v. HOROWITZ.

What plaintiff really wants this Court to do is to regrade some of his examination papers written while a student at the University of Michigan Dental School. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment was accompanied by an Affidavit signed by the plaintiff, to which plaintiff had attached (a) a copy of his examination, (b) a copy of his answer to the examination, and (c) a copy of a textbook used by the plaintiff. The plaintiff then asked the lower courts to compare the questions on the examination and the answers given with the textbook and regrade the plaintiff's examination. First of all, the grade given for the examination in question was never entered on plaintiff's transcript since the examination was given only for purposes of refreshing plaintiff's knowledge as to a particular procedure (see generally Kahler Deposition, 368a-391a) Second, and more important, no court should be asked to regrade a student. In his final reply brief filed in the District Court under date of February 9, 1979, plaintiff's attorney observed that "[i]t would be difficult, indeed, for any Court to become involved in a grading procedure from any school. However, * * * the Court must step in and the Court must protect the rights of that individual." Judge Churchill had earlier indicated, at the hearing of December 22, 1978, that he was not going to get involved in grading examination papers. (521a) Now, in this Court, plaintiff is once more asking a Court to regrade one of his examination papers. (See pp. 13, 18 of plaintiff's Petition where it is

urged that plaintiff's examination papers should be compared with the language of the textbook.) Rather than review his examination papers, the Court should review the history of his matriculation at Michigan. (55a-56a, defendants' chart, *supra* at 6-18)

Plaintiff was accorded all the process which was due him and was given special opportunities not extended to every student. If *Board of Curators* v. *Horowitz,* 435 US 78, 98 S Ct. 948, 55 L.Ed. 2d 124 (1978), requires a hearing and an opportunity to rebut the charges prior to dismissal, Mr. Minye had *three* hearings, two of them concerning his failure of Periodontics and Operative Dentistry. *If* he was entitled to have yet another hearing following his failure of two courses for a second time while on strict probation, then it must be said that he had more than what was required in the way of a "hearing" during three full days of depositions where his attorney cross-examined each of his faculty members. This was far more than the "give-and-take" exchange required by *Greenhill* v. *Bailey,* 519 F 2d 5 (8th Cir. 1975), and it is unfortunate that educators had to be exposed to this process at all.[3]

The condition of strict probation, under which Mr. Minye was readmitted on May 2, 1977, did not carry with it the obligation or agreement to give him a fourth hearing. That is why Dean Doerr was so careful to explain to Mr. Minye that if he failed his courses a second time he would be dismissed without recourse. (529a).

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[3] Petitioner's assertion that the defendants went out of their way to stigmatize him, thus giving him more rights under *Greenhill,* is unfounded. The letter cited (Petition, pp. 20-21) was written at the request of plaintiff and is an obvious attempt to assist his admission to another school. It cannot be fairly read as a confession of discriminatory treatment, though its bureaucratese may be imprecise. (39a)

Thus, when the Executive Committee was polled by Dean Doerr by telephone on August 23 and 24, 1977, they were not being polled to arrive at a new decision; rather, they were being asked whether they wished to *reaffirm* their old decision – which was carefully made after a face-to-face meeting with Mr. Minye – *i.e.,* did they want to reaffirm his dismissal from the Dental School based upon his failure of two clinical courses taken a second time. (219a) As testified by Dean Doerr:

> A. [By Dean Doerr]: * * * I think to put that in proper context, that was not a vote for dismissal. It was a cooperative polling of the executive committee to see whether or not they wished to affirm a previous decision.
>
> Their previous decision being when he was readmitted, Mr. Minye was readmitted on probation and it was stated that he must receive passing grades or he would be dismissed. When the failing grades were posted, the poll that Dean Mann then conducted was simply to determine whether or not they wished to affirm or reaffirm that previous action or whether they wished to reconsider the situation. [218a-219a]

This point is important. The initial decision was made "after lengthy discussion" and after Mr. Minye's personal appearance before the Executive Committee. (559a) The decision was to give Mr. Minye another chance to pass the two failed courses. *The giving of another chance did not include the giving of another hearing before the Executive Committee.* Three hearings were two too many.

## CONCLUSION

Thus the trial court did not depart from the accepted and usual course of judicial proceedings (S. Ct. Rule 19) either by receiving defendants' evidence (Part II, supra) or by asking all parties to provide him with evidence in an accessible form (Part I, supra), or by ruling in spite of plaintiff's choice or inability to provide him with such evidence (Part I, supra). Further, the trial court properly applied this Court's *Horowitz* decision, (Part III, supra) and thus did not come into conflict with this Court's decisions (S. Ct. Rule 19).

## RELIEF SOUGHT

Respondents pray that the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit be DENIED.

Respectfully submitted,

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October 29, 1980